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OCT 14 1983

TOXIC SUBSTANCES  
CONTROL DIVISION

October 12, 1983

Mr. Richard Wilcoxon  
Acting Chief Deputy Director  
Department of Health Services  
1219 "K" Street  
3rd Floor, Room 300  
Sacramento, California 95814

Dear Mr. Wilcoxon:

We have operated a responsible hazardous waste disposal facility in West Covina for over a decade. We have always cooperated and will continue to cooperate with government agencies, especially the Department of Health Services, using the best science and technology to assure that our operation continues to comply with all applicable regulations and permit requirements.

During these years, your staff and enforcement personnel have on numerous occasions inspected and visited the facility. Without exception we have been assured of our compliance with our Interim Status Document. Similar assurances have also been given to the public, our customers and local officials. As a consequence, we and no doubt others, have in good faith believed that the BKK Landfill was being operated in accordance with the ISD.

We are now suddenly confronted with a determination by the Department that notwithstanding our past record of cooperative compliance we are in violation of our ISD, and further, that we have somehow been negligent in committing the alleged violations. The Department has proposed a penalty of Twenty-Five Thousand Dollars (\$25,000.00) be paid by BKK as a part of a settlement agreement attached to your letter of September 23, 1983.

We responded by immediately requesting clarification of the Department's position. A meeting was held in your offices on September 28, 1983, at which your staff explained the rationale for the Department's actions.

We have carefully evaluated the notice of alleged violations and proposed settlement offer, taking into account the information provided by your staff at the September 28 meeting and have concluded that imposition of the proposed fine would be totally unjustified. First, we do not believe violations occurred; and to the extent a violation could be established it would clearly be of a technical nature unrelated to any demonstrated health risk to the public or BKK employees and customers. Second, the amount of the proposed fine is unprecedented and grossly disproportionate to the alleged violations. Our position on the individual alleged violations is described in the enclosed Response.

Please be assured that this is not a case of a company trying to escape responsibility or bargain for a lesser fine, we genuinely believe that we have, in good faith, complied with the Department's permit requirements. With respect to future operations, you may also be assured that we will adjust our operations to fit the Department's evolving permit requirements. We will remain firm, however, in our resolve that it would be manifestly unfair and unlawful to ascribe violations and assess penalties for nothing more than a failure to anticipate the present retroactive interpretation of our existing permit requirements.

We respectfully urge a review of the proposed penalty and a reasonable opportunity to meet the Department's request for operational changes.

Very truly yours,



Ronald R. Gastelum  
General Counsel

RRG:prc

encl

RESPONSE OF BKK CORPORATION  
TO SEPTEMBER 23, 1983 ALLEGATIONS BY  
DEPARTMENT OF HEALTH SERVICES  
OF VIOLATIONS AT BKK FACILITY

INTRODUCTION

The BKK Corporation has operated an environmentally responsible landfill and hazardous waste disposal facility in West Covina for many years. BKK has used and supported regulations requiring the use of the best available technology for waste disposal in order to prevent long term hazards from ever occurring.

This document constitutes a formal response to allegations of violations and proposed penalties contained in a letter received by the BKK Corporation from the Department of Health Services on September 26, 1983. The letter requested a response within 10 days. An informal discussion meeting was held between the parties on September 28, 1983. That discussion and that response concern only the alleged violations and proposed penalties from the Department; BKK remains willing to discuss any work desired by the Department at the BKK facility, such as that specified in Paragraph VIII of the letter.

As set forth in the discussion below, BKK contends that none of the alleged violations are correct. BKK further contends that it has operated its facility with due care and with due attention to all regulatory requirements.

GENERAL FACTS

1. On May 2nd and May 4th, and June 8th and 9th, 1983, Department (DOHS) Inspector Robert McCrohan conducted the latest of many inspections, studies, and site visits at the BKK Class I facility in West Covina. McCrohan completed a hand written inspection report on June 15th and left the employ of the Department on June 30th. At some time in August 1983, the Supervisor for the DOHS Los Angeles Region, Mr. John Hinton, directed staff member Michael Navalla to review the report and have it typed. The final inspection report was completed in mid or late August, and states that BKK is in compliance with all Interim Status Document provisions with one possible exception regarding a waiver from groundwater monitoring requirements. The inspection report suggests that this possible deficiency would be corrected by August 1st with the submission of the Part B Application for a permit submitted to EPA and DOHS. A copy of the report is attached as Exhibit A.
2. The May and June inspections were only the most recent of many such visits by persons authorized to enforce the Health & Safety Code and applicable regulations. In addition, countless telephone calls, meetings, and letters have been exchanged in a mutual discussion of BKK facility disposal practices. In no case prior to the May and June inspections has DOHS notified BKK of even one violation of the ISD.



Exhibit B sets forth a few of many examples in which BKK sought guidance from DOHS regarding interpretation of ISD requirements.

3. The Interim Status Document issued on December 22, 1980, was one step in the permit development process. Both at the time of its issuance, and subsequently by letter, DOHS has stated that the requirements of the ISD are taken from federal requirements imposed by EPA. DOHS has never issued any written guidance documents or any other information that would advise the public or facility operators of any more specific requirements imposed by DOHS or, indeed, of any manner in which compliance was to be accomplished at all. Nor is there evidence of any such guidance available to inspectors in the form of manuals or other appropriate explanatory materials. The only available interpretation of ISD language has been that available from the federal government. Exhibit C sets forth a few examples of DOHS statements regarding consistency with federal regulations.
4. On August 1, 1983, BKK filed its Part B Application for a hazardous waste disposal permit with EPA and DOHS. At all times pertinent herein, DOHS regional headquarters staff had access to the Part B Application. Sometime in late August or September, DOHS staff, Mr. Nestor Acedera and Ms. Marsha Croninger conducted their own review of BKK documents. In conjunction with that review they did not conduct an inspection of the site or rely on the results of Inspector

McCrohan's report. They had access to and in fact reviewed the Part B Application. Nevertheless they dated their findings of violations as of June 8.

5. On or about September 23rd, the Department of Health Services prepared and sent to BKK a letter alleging violations of the Interim Status Document and proposing a monetary penalty. The Department alleges four violations of groundwater monitoring requirements; one failure to specify an applicable year for its closure and post-closure cost estimates; one failure to specify frequency of hazardous waste analyses; and one violation of disposal requirements for ignitable and/or reactive wastes. As discussed below, these allegations are without merit.
6. On September 28, 1983, DOHS personnel met with BKK representatives to discuss these allegations. At that time Department staff stated that they were guided in preparation of the "settlement" document and proposed penalty by the Department's new "Enforcement Policy" announced on September 1, 1983. Assuming for purposes of discussion that that policy is valid, actions of the Department failed to comply with the following sections of that Policy: 2.202 (Incident Report), 2.302-2.303 (Report of Violations Requirements), 2.401-2.403 (Determination of Penalties), 2.601 (Documentary Support), and 2.602 (Inclusion of Supplemental Information at any time prior to formal settlement). In addition, there was no Complaint Document prepared by the Department pur-

suant to Section 2.701. It is also not clear whether the Enforcement Policy complies with the requirements of Government Code Section 11340 et. seq.

7. If the letter of September 23rd were not based on the Enforcement Policy, it is in excess of the regulatory powers assumed by the Department pursuant to 22 California Administrative Code Section 66320 et. seq. Assuming those provisions of the Administrative Code are valid and applicable to this proceeding any enforcement action is required to be predicated on an inspection report listing any alleged deficiency (Section 66328(c)). No such inspection report listing deficiencies has been filed. It is also apparent that the regulations require an opportunity for operators to submit a plan of correction specifying the actions to be taken and the expected dates of completion. (Section 66328(d)).

#### RESPONSE TO INDIVIDUAL ALLEGATIONS

##### I. Waste Analysis Plan

8. The Department alleges that BKK's written waste analysis plan is incomplete, not the operations of BKK's waste analysis at the facility. The alleged violation is not stating the frequency with which "the initial analysis of the hazardous waste will be reviewed or repeated to ensure that the analysis is accurate and up-to-date." At the September 28th meeting, Mr. Acedera and Miss Croninger stated that

this alleged deficiency is not based upon an inspection or any evidence other than their staff review of BKK documents. (It should be noted that the September 23rd DOHS letter advising BKK of alleged violations states that as a result of the inspections "the Department has determined that BKK is in violation of certain provisions of its ISD).

They also stated that this alleged deficiency is remedied in the Part B Application, where they stated that BKK says that it will do such an analysis annually. Ms. Croninger and Ms. Marian King further stated that federal interpretations of this planning requirement even though the substantive requirements are the same in every detail, do not govern the Department's interpretation of these requirements.

9. The short answer to this allegation could be that the Department itself states that BKK was in compliance with its own interpretation of these requirements on the date when these documents were reviewed, which was admittedly subsequent to August 1, 1983. The only "inspection" that found such a paperwork violation occurred after that date, at a time when the Department contends that BKK was in full compliance.
10. The longer answer to this allegation is more complex, and illustrates the inconsistency with which DOHS interprets this specific requirement. Section III.3 of the Interim Status Document (waste analysis) is taken word-for-word from 40 C.F.R. Section 265.13, the EPA regulations. Subpart (a)



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of these regulations require the owner or operator of a facility to obtain a detailed analysis of the waste prior to disposal. A parenthetical "comment" to these federal regulations, which is not part of the regulatory wording itself, states that such an analysis can come from the generator.

11. Part (b) of these regulations require the owner or operator to develop a written waste analysis plan which describes the procedures to be carried out in complying with Paragraph (a). At a minimum the plan must specify certain matters, including the frequency "with which the initial analysis of the wastes will be reviewed or repeated to ensure the analysis is accurate and up-to-date:..." (emphasis added) Part (a), meanwhile, specifies that the analysis must be repeated at the minimum when the owner or operator has reason to believe that the generator has changed processes or that there is a discrepancy between the hazardous waste received and the information on the manifest. In comments accompanying the promulgation of this requirement and on May 19, 1980, the Environmental Protection Agency stated that it no longer proposed requiring facilities to analyze all loads or to require an annual or periodic repetition of analysis, but rather only this minimum (45 Fed. Reg. 33179, 33180).
12. In accord with the language in the Interim Status Document and federal regulations, as explained in the Federal Register, BKK's Operations Plan states that it will require

supplemental analysis under the minimum conditions required in Part (a) of those regulations.

13. At the September 28th meeting, DOHS staff stated that BKK may not rely upon generator-supplied analyses, and must conduct its own analysis. Nevertheless, it stated that BKK was in compliance with these requirements in its Part B Application, wherein BKK states that it will rely on generator analyses and will require those analyses to be updated under the conditions previously specified or at least annually by the generator. (BKK inserted this latter requirement to facilitate disposal operations, not to comply with any regulatory requirements.) In short, in one meeting DOHS states both that generator analyses are and are not generally sufficient for compliance. In fact, the Department has for years accepted generator analyses of waste for disposal purposes, as does EPA, except where there is reason to believe that there is a manifest discrepancy or where processes have changed, or, pursuant to BKK's Operations Plan, where BKK is not familiar with the generator and its waste.

14. In summary, BKK was in compliance with its Interim Status Document in May and June 1983. Moreover it is considered by the Department to be in compliance as of August 1, 1983. Both dates were prior to the "inspection" paperwork review conducted by DOHS staff in late August and early September. Accordingly, there is no violation.

II. CLOSURE AND POST-CLOSURE COST ESTIMATES

15. The Department states that BKK did not identify the applicable year for "closure and post-closure cost estimates" in its report. This allegation is not based on the May and June inspections, for Mr. McCrohan found no such violation. Rather, the Department admits that the alleged violation is based on a subsequent review of documents by DOHS staff in late August and September. On August 1, 1983, BKK submitted a new closure and post-closure cost estimate to EPA and DOHS, which estimates are dated August 1, 1983.
16. The short answer once again is that according to the Department BKK was in compliance at the time it conducted its review of documents in late August or September. The Department also has reason to know that the alleged violation is clearly inconsequential, and that any doubt as to the year of the estimate could have been obtained through a phone call.
17. Even as of June 9, the Department's allegation is not correct. The Department cites Sections VII(1)(c) and XI(8) of the Interim Status Document. There is no Section XI(8). The Department may be referring to Section IX(8). Even so, none of these sections requires that BKK "identify the applicable year" for the closure and post-closure cost estimates submitted in the Report. BKK certainly estimated the date for which such closure and post-closure cost estimates were estimated, namely the year 2010.

18. It should also be noted that BKK had previously established and reported to the Department financial assurances for closure and post-closure activities. There is no allegation that BKK has not prepared such a report, nor that it is not in compliance with said requirements.

III. Ignitable and Reactive Waste Disposal

19. The Department alleges that BKK has placed ignitable and/or reactive wastes in the landfill without treating, rendering or mixing the wastes before or immediately after placement in the landfill so that the resulting waste is no longer ignitable or reactive, as required by Section X(6) of the Interim Status Document. The requirements in this section are word-for-word the same as those in <sup>40</sup>45 C.F.R. Section 265.312. EPA had originally proposed a virtual prohibition of disposing of such wastes in landfills. However, as EPA noted in the Preamble to the promulgation of these regulations on May 19, 1980, subparagraph:

"commentors suggested that these wastes can be placed in a way, such as by blending with soil or with other materials, that eliminates or minimizes the danger of fires or explosions."  
(45 Fed. Reg. at 33213).

As EPA also noted, these comments indicated "that such treatment is not uncommon and should not be prohibited."  
(45 Fed. Reg. at 33183.) Accordingly, the rule was relaxed so as to allow such mixing if the resulting mixture is neither ignitable nor reactive. For many wastes, moreover, ignitability requires not only the ability to ignite, but



also requires that when ignited, it "burns so vigorously and persistently that it creates a hazard." (40 C.F.R. Section 261.21(a)(2)). (DOHS regulations do not contain a definition of ignitable or reactive wastes.)

20. In the decade in which it has accepted ignitable and reactive wastes at the facility, BKK has never experienced a fire or explosion from such disposal after placement and mixture in the landfill, much less persistent burning so as to create a hazard.
21. Department staff admit that they do not base their alleged violation on the results of any inspection, nor on any observation of actual practices at the facility. Indeed, all visits, studies, and inspections that have taken place at the facility since issuance of the Interim Status Document have found no violation of these requirements. DOHS staff have also stated on several occasions that BKK is in full compliance with ISD requirements. DOHS in fact has no evidence of any sort that these practices violate the Interim Status Document or federal regulations. BKK respectfully submits that no facts have been set forth to indicate a violation of this provision.
22. For all of the reasons discussed above, it appears clear that BKK's handling of ignitable and reactive wastes is in conformity with the Interim Status Document, federal regulations, and good practice. BKK remains willing to discuss

any reasonable concerns regarding these practices that the Department may now have.

IV. Groundwater Monitoring

23. The Department alleges: (1) that BKK did not prepare an outline of a groundwater assessment program by November 19, 1981; (2) that BKK's groundwater sampling and analysis plan does not specify analytical procedures; (3) that BKK quarterly samples have not established background values for all parameters specified in the ISD; and (4) that BKK has not sealed the annular space in each monitoring well with appropriate materials. At the September 28th meeting BKK stated that it did not have a groundwater monitoring program designed to comply with ISD requirements because BKK has met waiver requirements under 40 C.F.R. Section 265.90, and that the monitoring program that does exist was designed to comply with Regional Water Quality Board requirements. Department attorneys at that time alleged (a) that no waiver from the provisions could be obtained without a formal grant from the Department and (b) that the groundwater monitoring requirements were not the same as those in federal regulations.

24. It is true that BKK did not prepare a groundwater quality assessment program by November 19, 1981. This failure does not, however, constitute a violation of the ISD. On November 18, 1981, the Department of Health Services by written notice postponed all groundwater monitoring requirements

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until further notice. (See Exhibit C). In doing so, the Department stated "the conditions we imposed in your ISD were prescribed to be in concert with the required federal standards". The Department stated that operators should still follow Regional Water Quality Control Board requirements.

25. Department attorneys are incorrect in stating that a formal waiver had to be received from DOHS. On January 20, 1982, the Department again notified operators regarding groundwater monitoring requirements. (Exhibit D). The notice states in pertinent part that the "waiver provision has been broadened to allow the operator of a hazardous waste facility to waive some or all of the groundwater monitoring requirements in the ISD..." if an appropriate waiver meeting federal requirements is kept at the facility. The notice goes on to state "this modification will make California's requirements consistent with federal requirements for groundwater monitoring." (emphasis added)

26. The preceeding two paragraphs illustrate the Department's attorneys are also incorrect in stating that the uppermost aquifer referred to in the waiver provisions prescribed in the January 20, 1982 letter do not refer to the uppermost aquifer underlying the facility. Not only is the language in the attached waiver provision precisely the same as that in 40 C.F.R. Section 265.90(c), in referring to the "uppermost aquifer," but also that language in that Section



Mr. Johnson states that he never made this statement to Mr. McCrohan or to any other person. Mr. Johnson believes that the demonstration is and was adequate. Mr. Johnson is prepared to submit a declaration to that effect if necessary.

31. Mr. McCrohan also mentions work being performed by LeRoy Crandall & Associates. Such work is not being performed pursuant to ISD requirements, but rather to assure compliance with 40 C.F.R. Section 264, which requirements are different than those under 40 C.F.R. Section 265 and the ISD.

#### V. Penalty Assessment

32. BKK has demonstrated that it has not violated ISD requirements. Accordingly, no penalty is appropriate.
33. Even if any one of the seven alleged violations were proven, it is clear that BKK's violation would be neither intentional nor negligent. Accordingly, no penalty would be appropriate. The trail of correspondence, letters, notices, inspections, and telephone conversations demonstrates above all else a desire on the part of BKK to comply with applicable requirements, a concern on the part of BKK to obtain guidance from the Department, and a welter of conflicting

and confusing messages from the Department in interpreting its own regulations and corresponding regulations of EPA. Under these circumstances, DOHS is not authorized to impose a penalty on BKK.

VI. Conclusion

34. BKK denies the allegations of the Department contained in its paragraph VI and does not agree to pay the Department any civil penalty as requested in the Department's paragraph VII. BKK remains willing at any time to reach agreement with the Department on needed procedures or actions at the site and remains willing to discuss such matters at any time.

Respectfully submitted,

Ronald R. Gastelum  
General Counsel  
BKK Corporation

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265.90(c) refers clearly to the definition of uppermost aquifer in Section 265.90(a) as the "uppermost aquifer underlying the facility."

27. BKK has maintained and continues to maintain appropriate documentation meeting the waiver requirements at its facility. BKK continues to believe that these documents demonstrate that there is no potential for migration of hazardous waste or hazardous wastes constituents from the facility via the uppermost aquifer to water supply wells, in part because there is no such aquifer.

28. As a result, BKK has followed all Regional Water Quality Control Board requirements for groundwater monitoring, but has not attempted to comply with the ISD requirements. For example, BKK did not prepare an outline of a groundwater quality assessment program pursuant to the ISD. BKK has sampled quarterly for all parameters specified in Regional Board documents. The Regional Water Quality Control Board does not require sampling for coliform bacteria or turbidity, as would be required by the ISD, and consequently BKK does not sample for those parameters. (Note: As of October 4, 1983 the Board modified its order to require sampling for coliform bacteria and turbidity). BKK's sampling and analysis plan does not specify analytical procedures because the Regional Board does not require such specifications. The Board instead requires that lab samples



be sent to a certified laboratory, a requirement that BKK complies with at all times. BKK does seal the annular space in each monitoring well with material which is capable of preventing the contamination of samples and any groundwater, as discussed below, but does not do so in any way intended to comply with ISD requirements, which are inapplicable.

29. With regard to the sealing of annular spaces, BKK contends as discussed above, that such requirements are inapplicable because no groundwater monitoring program is required. The monitoring wells in question are leachate monitoring wells that are required by the Regional Water Quality Control Board. In passing, however, BKK notes that the material used is capable of preventing contamination of samples in any groundwater. The Department has not presented any evidence to suggest that the material is not so capable, and has instead challenged BKK to demonstrate that it is not violating this requirement. If the requirements were applicable, and DOHS had reason to question BKK's compliance, it is required by its own Enforcement Policy, to investigate any such alleged violation and determine whether it has occurred.

30. The Department has not alleged that BKK's waiver demonstration is inadequate. Nor may it base such an allegation on any statement of BKK's staff. In his inspection report Mr. McCrohan notes that Mr. Joseph Johnson of BKK stated that BKK's waiver demonstration was inconclusive and inadequate.

Mr. Johnson states that he never made this statement to Mr. McCrohan or to any other person. Mr. Johnson believes that the demonstration is and was adequate. Mr. Johnson is prepared to submit a declaration to that effect if necessary.

31. Mr. McCrohan also mentions work being performed by LeRoy Crandall & Associates. Such work is not being performed pursuant to ISD requirements, but rather to assure compliance with 40 C.F.R. Section 264, which requirements are different than those under 40 C.F.R. Section 265 and the ISD.

V. Penalty Assessment

32. BKK has demonstrated that it has not violated ISD requirements. Accordingly, no penalty is appropriate.
33. Even if any one of the seven alleged violations were proven, it is clear that BKK's violation would be neither intentional nor negligent. Accordingly, no penalty would be appropriate. The trail of correspondence, letters, notices, inspections, and telephone conversations demonstrates above all else a desire on the part of BKK to comply with applicable requirements, a concern on the part of BKK to obtain guidance from the Department, and a welter of conflicting

and confusing messages from the Department in interpreting its own regulations and corresponding regulations of EPA. Under these circumstances, DOHS is not authorized to impose a penalty on BKK.

VI. Conclusion

34. BKK denies the allegations of the Department contained in its paragraph VI and does not agree to pay the Department any civil penalty as requested in the Department's paragraph VII. BKK remains willing at any time to reach agreement with the Department on needed procedures or actions at the site and remains willing to discuss such matters at any time.

Respectfully submitted,

Ronald R. Gastelum  
General Counsel  
BKK Corporation